

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY  
ASSOCIATION OF PENSION LAWYERS]

September 21 2011

Michael Plowgian  
International Tax Counsel Office  
Department of the Treasury  
1500 Pennsylvania Avenue NW  
Washington DC 20220  
USA

Dear Sir,

**The Foreign Account Tax Compliance Act (“FATCA”) effect on UK pension provision**

I am writing to you on behalf of the UK’s Association of Pension Lawyers. The Association of Pension Lawyers is a British organisation which exists to provide awareness on the importance of the role of law in the provision of pensions. We have over 900 members most of whom are lawyers practising in England, Wales and Scotland.

We understand that in relation to the implementation of FATCA you are seeking comments from relevant organisations on the impact of FATCA internationally. We are writing to express our concern about its effect on UK pension plans which may, we believe, have unintended consequences.

Our understanding is that the intention of the legislation is to ensure that, amongst other things, overseas investment vehicles are not used by US tax payers to avoid tax. In this regard, full disclosure of holdings in Foreign Financial Institutions (“FFIs”) and Non-Financial Foreign Entities (“NFFEs”) are required in order to avoid a 30% withholding tax on payments such as dividends.

Our concern is that under the legislation UK pension plans will be Foreign Financial Institutions. The exemption that is intended to exclude pension plans such as those in the UK does not achieve its purpose, because it requires members and beneficiaries of exempt pension plans to work for the employer in the country in which the plan is established.

UK pension funds are significant investors in the US investment markets. If the legislation remains as now drafted, it will discourage continued investment in the US.

**UK pension plans**

There are two different types of pension arrangement that may be caught by this FATCA and find themselves subject to unwarranted attention. These are occupational pension plans and personal pension plans.

- Occupational pension plans are established under trust, and sponsored by one or more related employers. The beneficiaries of these plan will primarily be employees but may also include their dependents such spouses, children and other relations. There is not currently any requirement that such plans collect information concerning the citizenship of the members or beneficiaries or potential beneficiaries, and therefore the plans will not be able to report as to whether they do or might benefit US citizens. Moreover, the beneficiaries (as opposed to the members) will only rarely be employed by the sponsoring employer and therefore it is likely that if any beneficiary or potential beneficiary is a US citizen, the plan will not be exempt. Most importantly, the purpose of establishing these plans is to provide benefits for employees of a UK employer, and therefore would not easily be used by a US citizen to avoid US taxation.
- UK pensions may also be provided through a personal pension arrangements not unlike a 401K as a savings vehicle. These are typically sponsored by insurance companies, invested in unitised funds offered by the insurance company, and are subject to the same tax regime as occupational plans, although individuals can contribute to their pension accounts when self-employed. The sponsoring institutions will not have records of which members are US citizens, and certainly will not know the citizenship of potential beneficiaries. Like occupational plans, there would be little incentive to use these accounts to evade US tax. Whereas the tax treatment of UK registered plans is tax-efficient within the UK, the tax incentives have been significantly restricted in recent years, and tax efficient contributions are limited to £50,000 per annum since April 6, 2011. Moreover, most such arrangements do not permit the individual to choose the investments used, so could not be chosen by any US citizen intending to avoid US tax on US investments.

The UK is also in the process of introducing compulsory pension arrangements in the workplace, and has established an occupational pension plan known as the National Employment Savings Trust (“NEST”). NEST will be established as a single trust with many individuals as members whose benefits

are earmarked and identifiable within the single fund. It would appear that this plan will be a foreign financial institution as it will be very large, and some beneficiaries will doubtless be US citizens.

### **Scope of exemption**

We do not believe that there is any reason for a significant concern that UK tax registered pension plans would be used to avoid US tax, particularly given the limits to contributions that can be made to a registered pension plan. On that basis, it would appear appropriate to exempt them from the proposed reporting requirements and withholding tax. As stated above, the current exemption does not work, because the plans are often very large, covering thousands of members. Their administrators will not know the citizenship of their memberships, much less of their beneficiaries.

We propose that a foreign financial institution be exempt where:

- it is qualified as a retirement plan for tax purposes under the tax legislation in the country in which it is established; and
- the country in which it is established has a double taxation treaty with the US that contains a provision governing the exchange of information between governments.

We believe that such an exemption should give US regulators considerable comfort that the plan is bona fide inasmuch as the contributions to such plans are already tax-exempt.

For the avoidance of doubt, we also believe that UK pensions plans meeting the above criteria should be exempt from the provisions applicable to NFFEs as well.

This appears to be the most practical method of dealing with this particular issue. However, if this is not possible from your point of view, we would suggest that, for the reasons given above, the exemption should be extended to all UK occupational pension plans, including NEST, which are established by employers and therefore cannot be established by individuals to avoid US tax.

If you are unable to extend the exemption to all personal pension plans, it would seem appropriate to extend it to those where the individual does not have control over investments. As mentioned above, most plans do not offer it is usually from a limited list of funds. As such, it is very difficult for a US individual to pinpoint an investment that they wish to invest in through a UK pension plan and only a small number of such plans give the individual that power. The exemption could therefore apply where the individual cannot direct any of the investments made by the fund.

In addition, it would be impractical to extend this obligation to such arrangements that are established at any time before this legislation became effective. As UK pension providers do not presently take steps to discover whether any new customers are US citizens, it would be impractical for providers to police this except for new business. Given, as we understand it, the aim of your legislation is to stem future

attempts by US citizens to set up overseas arrangements to avoid US tax, it would be consistent with this to limit any requirements to new pension arrangements which fall within the definition of “investment regulated pension scheme” referred to above.

We would of course be very happy to discuss any of these issues with you. Please contact the writer with any comments or questions.

Yours faithfully

[signed]  
Association of Pension Lawyers  
London

cc:  
George Bostock - US Treasury  
Oonagh McDevitt - NEST